D R A F T

MEMORANDUM TO MEMBERS ADVISORY COMMITTEE ON CRIMINAL RULES

FROM: John C. Pickett, Chairman

1. Attached are proposed amendments and proposed Advisory Committee Notes with reference to Rules 4, 15, 17, 18-21, 23, 24, 28-31, 33-35, 45, 49, 54-56. I have discussed these proposals with Professor Barrett and we are agreed that an attempt should be made to secure committee approval without further discussion at a committee meeting.

2. Will each of you write to me and indicate as to each rule whether or not you agree to the inclusion of the rule and comment on its present form in the tentative draft which will be circulated (hopefully next fall) for comments by the bench and bar. Minor drafting suggestions will be welcomed, but unless serious disagreements of policy are raised which appear to demand committee discussion, it is my thought that a majority vote in favor of the rule will place it in the Tentative Draft. A majority vote against the rule will place it on our agenda for further discussion. Remember that we are deciding at this time only that the proposal is worth enough in substance and sufficiently well formulated to justify circulating it as a tentative committee proposal. Ample opportunity for redrafting and reconsideration will be afforded after comments have been received. Only by submitting proposals for such comments can we hope to get the detailed criticism from those involved in the daily use of the rules that is essential to arriving at definite conclusions.

3. On the agenda for our next meeting will be discussion of the important and difficult problems involved in Rules 5, 6, 26A, 8, 11, 14A, 16, 17A, 32, 37, 44, 46. Professor Barrett will have a new draft for circulation on these rules early in the summer. In the meantime any comments that any of you have on the latest draft re each of the above rules should be sent to Professor Barrett so that he can consider them in the process of formulating the new draft.

4. We recommend that at this stage of the work of the committee no changes should be proposed for the following rules: 1-3, 7, 9, 10, 12, 13, 14, 22, 25-27, 36, 38-43, 47, 48, 50-53, 57-60. For the latest explanation of the reasons for not proposing changes in these rules, see the document submitted by the Reporter entitled: Summary of Proposals for Discussion at April Meeting. Since ours is a continuing committee future consideration of any of these rules is not foreclosed. It seems desirable, however, that we now focus our work enough to permit the preparation and circulation of a draft early next fall.

5. It is also our proposal that the Committee should circulate and comment on only changes proposed and not on changes considered and rejected. Ultimately the Supreme Court and the Congress will act only on the changes we suggest and it seems better that we not prejudice the future by making a record of committee decisions not to act.

May 16, 1962

Rules proposed for committee vote as to whether they are ready to include in the Tentative Draft to be circulated to the bench and bar.

Rule 4. WARRANT OR SUMMONS UPON COMPLAINT

(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits sworn to before a commissioner or other officer empowered to commit persons charged with offenses against the United States and filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

ADVISORY COMMITTEE'S NOTE

Subdivision (a). As presently written subdivision (a) requires that the complaint shall show "probable cause to believe that an offense has been committed and that the defendant has committed it" before a warrant of arrest can issue. In Giordenello v. United States, 357 U.S. 480 (1958) it was held that to support the issuance of a warrant the complaint must contain in addition to a statement "of the essential facts constituting the offense" a statement of the facts relied upon by the complainant to establish probable cause. The amendment proposed here would not change the basic holding in the Giordenello case but would permit the complainant to state the facts constituting probable cause in a separate affidavit (similar to the affidavit required for a search warrant under Rule 41) in lieu of spelling them out in the complaint.

RULE 15

DEPOSITIONS

(a) When Taken. If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion ~~of a defendant~~ and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed, the court may discharge the witness.

(g) At Instance of the Government or Witness. The following additional requirements shall apply if the deposition is taken at the instance of the government or a witness. The officer having custody of a defendant shall be notified of the time and place set for the examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall be given notice and shall have the right to be present at the examination. The government shall pay to the defendant's attorney and to a defendant not in custody expenses of travel and subsistence for attendance at the examination.

ADVISORY COMMITTEE'S NOTE

Subdivision(a) is revised to permit the government to take depositions for the same reasons as the defendant.

Some twenty-two jurisdictions permit depositions to be taken by the prosecution, some with limitations as to classes of cases or a requirement of consent by the defendant. See listing in 5 Wigmore, Evidence 1389 n. 6 (3rd ed. 1940); Mo. Sup.Ct. Rule 25.13. Wigmore cites numerous decisions upholding the constitutionality of such provisions. Id. at n. 4.

Provision is made in a new subdivision (g) to protect the right of the defendant to be present when a deposition is being taken at the instance of the government or a witness. Provision is also made for paying the expense of defendant and his counsel when a deposition is taken at the instance of the government or a witness.

RULE 17

SUBPOENA

(d) A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and, except in the case of a person subpoenaed on behalf of the government, by tendering to him the fee for 1 day's attendance and the mileage allowed by law.

ADVISORY COMMITTEE'S NOTE

Subdivision (d) is revised to bring it into conformity with 28 U.S.C. §1825.

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RULE 18

DISTRICT AND DIVISION

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed, ~~but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed.~~ The court shall fix the place of trial within the district.

ADVISORY COMMITTEE'S NOTE

The amendment eliminates the requirement that the prosecution shall be in a division in which the offense was committed and vests discretion in the court to fix the place of trial at any place within the district.

The Sixth Amendment provides that the defendant shall have the right to a trial "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ." There is no constitutional right to trial within a division. See Barrett v. United States, 169 U.S. 218 (1898); United States v. Anderson, 328 U.S. 699, 704, 705 (1946); McNealy v. Johnston, 100 F.2d 280, 282 (9th Cir. 1938); Carrillo v. Squier, 137 F.2d 648 (9th Cir. 1943); Lafoon v. United States, 250 F.2d 958 (5th Cir.1958).

The existing requirement for venue within the division in which the offense was committed may result in undue delay in the disposition of criminal cases in situations in which the court holds only brief and infrequent terms within particular divisions. This delay is particularly serious if the defendant is unable to secure his release on bail. The matter is further complicated by the existence in some districts of so-called "non-statutory divisions" which are held not to fall within the venue limitations of Rule 18. Ippolito v. United States, 223 F.2d 154 (5th Cir.,1955); Cagnina v.

Omission of 19 approved 10/3

RULE-19 -

TRANSFER-WITHIN THE DISTRICT-

In-a-district consisting-of two or-more divisions the arraignment may be-had, a plea-entered, the trial conducted or-sentence imposed,-if the defendant consents, in-any-division and at-any-time.-

ADVISORY COMMITTEE'S NOTE

Rule 19 is deleted as unnecessary in view of the amendment to Rule 18 eliminating venue in the divisions.

Rule 20

TRANSFER FROM THE DISTRICT FOR PLEA AND SENTENCE

(a) Indictment or Information Pending. A defendant arrested or held in a district other than that in which the indictment or information is pending against him may state in writing, after receiving a copy of the indictment or information, that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested is held, subject to the approval of the United States Attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States Attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is held and the prosecution shall continue in that district.

(b) Indictment or Information Not Pending. A defendant arrested on a warrant issued upon a complaint in a district other than the district of arrest may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the warrant was issued and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States Attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States Attorneys and upon the filing of an information or the return of an indictment, the clerk of the court for the district in which the warrant was issued shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant was arrested and the prosecution shall continue in that district. When the defendant is brought before the court to plead to an information filed in the district where the warrant was issued,

he may at that time waive indictment as provided in Rule 7, and the prosecution may continue based upon the information originally filed.

(c) Effect of Not Guilty Plea. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced and the proceeding shall be restored to the docket of that court. The defendant's statement shall not be used against him unless he was represented by counsel when it was made.

(d) Juveniles. A juvenile (as defined in 18 U.S. Code §5031) who is arrested or held in a district other than that in which he is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment after he has been advised by counsel and may with the approval of the court consent to be proceeded against as a juvenile delinquent in the district in which he is arrested or held. The consent shall be given in writing before the court but shall be received by the court only after it has fully apprised him of his rights, including the right to be returned to the district in which he is alleged to have committed the act, and of the consequences of such consent.

ADVISORY COMMITTEE'S NOTE

Present Rule 20 has proved to be most useful. In some districts, however, literal compliance with the procedures spelled out by the rule has resulted in unnecessary delay in the disposition of cases. This delay has been particularly troublesome where the defendant is arrested prior to the filing of an indictment or information against him. See, e.g., the procedure described in Donovan v. United States, 205 F.2d 557 (C.A.10, 1953). Furthermore, the benefit of the rule has not been available to juveniles electing to be proceeded against under 18 U.S.C. §§ 5031-5037. In an attempt to clarify and simplify the procedure the rule has been recast into four subdivisions.

Subdivision (a). This subdivision is intended to apply to the situation in which an indictment or information is pending at the time at which the defendant indicates his desire to have the transfer made. The requirements

are made to the present language of the rule. In the first sentence the words "or held" are added and the words "is held" substituted for the words "was arrested" to make it clear that a person already in state or federal custody within a district may request a transfer of federal charges pending against him in another district. See 4 Barron, Federal Practice and Procedure 146 (1951). The words "after receiving a copy of the indictment or information" are deleted. The defendant should be permitted if he wishes to initiate transfer proceedings under the Rule without waiting for a copy of the indictment or information to be obtained. The defendant is protected against prejudice by the fact that under subdivision(c) he can, in effect, rescind his action by pleading not guilty after the transfer has been completed.

Subdivision (b). This subdivision is intended to apply to the situation in which no indictment or information is pending but the defendant has been arrested on a warrant issued upon a complaint in another district. Under the procedure set out he may initiate the transfer proceedings without waiting for the filing of an indictment or information in the district where the complaint is pending. Also it is made clear that the defendant may validate an information previously filed by waiving indictment in open court when he is brought before the court to plead. See United States v East, 5 F.R.D. 389 (N.D. Ind. 1946). Here again the defendant is fully protected by the fact that at the time of pleading in the transferee court he may then refuse to waive indictment and rescind the transfer by pleading not guilty.

Subdivision(c). The last two sentences of the existing rule are included here. The last sentence is amended to forbid use of the defendant's statement against him whether or not he was represented by counsel when it was made. Since under the amended rule the defendant may make his statement prior to receiving a copy of the indictment or information, it would be unfair to permit use of that statement against him.

Subdivision(d). Under 18 U.S.C. § 5033 a juvenile who has committed an act in violation of the law of the United States in one district and is apprehended in another must be returned to the district "having cognizance of the alleged violation" before he can consent to being proceeded against as a juvenile delinquent. This subdivision will permit the juvenile with the approval of the court to consent to be proceeded against in the district in which he is arrested or held.

RULE 21

TRANSFER FROM THE DISTRICT ~~OR DIVISION~~ FOR TRIAL

(a) For prejudice in the District ~~or Division~~. The court upon motion of the defendant shall transfer the proceeding as to him to another district ~~or division~~ whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district ~~or division~~ where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district ~~or division~~.

(b) Offense Committed in Two or More Districts ~~or Divisions~~. The court upon motion of the defendant shall transfer the proceedings as to him to another district ~~or division~~ if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district ~~or division~~ and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district ~~or~~ division in which the commission of the offense is charged. When two or more offenses are charged against the defendant, the court may upon motion of the defendant and in the interest of justice transfer all or part of the counts to one or more of the districts which in transferred charges an offense committed in the district to which the transfer is ordered.

ADVISORY COMMITTEE'S NOTE

Sub-division(a). It has been held that on a motion under this subdivision the court can order a transfer only to the district or division specified in the defendant's motion. United States v. Parr, 17 F.R.D. 512 (S.D. Tex. 1955) appeal dismissed, 235 F.2d 329, aff'd 351 U.S. 513. The amendment would permit the court to select the district to which the transfer should be made. The amendment also eliminates all references to divisions in accordance with the amendment to Rule 18 eliminating division venue. Transfers within the district will be within the discretion of the judge under his power to fix the place of trial. See Rule 18.

Subdivision(b). The present wording of the subdivision has created confusion as to the proper procedure when there are multiple counts against

a defendant. See, e.g., United States v. Choate, 276 F.2d 724 (5th Cir.1960). The amendment makes it clear that where one of several offenses charged was committed in more than one district the court has discretion on motion of the defendant (1) to sever that offense and transfer it, (2) to transfer all of the offenses charged, or (3) to refuse to transfer any of the offenses. The amendment also eliminates references to divisions in accordance with the amendment to Rule 18.

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RULE 23

TRIAL BY JURY OR BY THE COURT

(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

ADVISORY COMMITTEE'S NOTE

This amendment adds to this rule a provision added to Civil Rule 52(a) in 1946.

RULE 24

TRIAL JURORS

(c) Alternate Jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, and 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternature juror.

ADVISORY COMMITTEE'S NOTE

Experience has demonstrated that four alternate jurors may not be enough for some lengthy criminal trials. See, e.g., United States v. Bentvena, 288 F.2d 442 (2nd Cir. 1961). The amendment to the first sentence increases the number authorized from four to six. The fourth sentence is amended to provide an additional peremptory challenge where a fifth or sixth alternate juror is used.

The words "or are found to be" are added to the second sentence to make it clear that an alternate juror may be called in the situation where it is first discovered during the trial that a juror was unable or disqualified to perform his duties when he was sworn.

RULE 28

EXPERT WITNESSES AND INTERPRETERS

(a) Expert Witnesses. The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties may call expert witnesses of their own selection.

(b) Interpreters. The court may appoint an interpreter of its own selection and may determine the reasonable compensation of such interpreter, and direct its payment out of such funds as may be provided by law.

ADVISORY COMMITTEE'S NOTE

[This amendment was proposed by the Committee on Court Administration and Supporting Personnel of the Courts and was approved in principle by the Judicial Conference at its September 1961 session. When the reports of those committees and the action of the Conference are available, a note will be drafted reflecting the reasons given by them for the action.]

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RELE 29

MOTION FOR ACQUITTAL

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(b) Reservation of Decision on Motion.-If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.- If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. -If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. -If no verdict is returned the court may order a new trial or enter judgment of acquittal.-

(b) Motion after Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 5 days after the jury is discharged or within such further time not exceeding 5 days as the court may fix during the 5-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury. A motion for new trial shall be deemed to include a motion for judgment of acquittal as an alternative.

delete

ADVISORY COMMITTEE'S NOTE

Subdivision (a). The entire section is recast by the amendment to treat motions made before the case has gone to the jury in this subdivision and those made after discharge of the jury in subdivision (b). In line with this modification, the first sentence of the original subdivision (b) is added to subdivision (a).

Subdivision (b). The amended subdivision makes several changes in the existing procedure. A motion for judgment of acquittal may be made after discharge of the jury whether or not a motion was made before submission to the jury. Unlike the comparable situation in civil cases it seems unlikely that the courts would hold that the government as the defendant has a constitutional right to a jury trial which would prevent the court from directing an acquittal on a post-verdict motion. See Adams v. United States, ex rel. McCann, 317 U.S. 269 (1942); 65 Yale L. J. 1032 (1956).

The time in which the motion may be made has been changed to permit the judge to extend the time for not more than 5 days as is provided for motions for new trial (Rule 33) and in arrest of judgment (Rule 34). See the discussion under Rule 33.

References in the existing rule to the motion for a new trial as an alternate to the motion for judgment of acquittal and to the power of the court to order a new trial have been eliminated. Motions for new trial are adequately covered in Rule 33. Also the existing wording is subject to the interpretation that a motion for judgment of acquittal gives the court power to order a new trial even though the defendant does not wish a new trial and has not asked for one.

It is provided that a motion for new trial shall be deemed to include a motion for judgment of acquittal. The defendant will always prefer an acquittal to a new trial, and no need appears to require him to make a separate motion.

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RULE 30

INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing or presence of the jury.

ADVISORY COMMITTEE'S NOTE

The amendment makes it clear that the judge may ask the jury to withdraw where necessary to permit full argument of objections to instructions.

RULE 33

NEW TRIAL

The court on motion of a defendant may grant a new trial to ~~a defendant~~ him if required in the interest of justic If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time not exceeding 5 days as the court may fix during the 5-day period.

ADVISORY COMMITTEE'S NOTE

The amendment to the first two sentences are designed to make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant. Problems of double jeopardy arise when the court acts on its own motion. See United States v. Smith, 331 U.S. 469 (1947).

The amendment to the last sentence restricts to 5 days the extension of time in which to move for a new trial. It appears desirable to so limit the time in order that the motion must be made within the 10 day period in which it will serve to extend the time for appeal. See Rule 37.

Suggestions that the time in which motions must be made under this rule be lengthened and under Rule 34 have been considered but not approved. Such motions are normally made and disposed of prior to the entry of judgment. Since they can be made in simple form and since the court has power to extend the time for 5 days where reason appears, good policy would appear to favor keeping the time limits short in order to avoid delay in the disposition of criminal cases. It is true that practical problems may arise where the defendant is not represented by counsel at the time of judgment or plea. The remedy for these problems, however, would appear to lie in the direction of providing counsel rather than in the direction of extending the time in which these motions can be made. State law generally provides for very short time periods. See American Law Institute, Code of Criminal Procedure 1040-1042, 1076-1077 (1931). Some states even require that they be made and disposed of prior to the entry of judgment. See, e.g., Cal. Pen. C. §§ 1182, 1185, 1202.

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RULE 34

ARREST OF JUDGMENT

The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after ~~determination of guilt~~ verdict or finding of guilty, or after plea of guilty or nolo contendere, or within such further time [not exceeding 5 days] as the court may fix during the 5-day period.

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ADVISORY COMMITTEE'S NOTE

The words "on motion of a defendant" are added to make clear here, as in Rule 33, that the court may act only pursuant to a timely motion by the defendant.

The amendment to the second section is designed to clarify an ambiguity in the rule as originally drafted. In Lott v. United States, 367 U.S. 421 (1961) the Supreme Court held that when a defendant pleaded nolo contendere the time in which a motion could be made under this rule did not begin to run until entry of the judgment. The Court held that such a plea was not a "determination of guilt." No reason of policy appears to justify having the time for making this motion commence with the verdict or finding of guilt but not with the acceptance of the plea of nolo contendere or, possibly, the plea of guilty. The amendment will change the result in the Lott case and make the periods uniform.

For a discussion of the time periods see Advisory Committee Note to Rule 33.

The court may correct an illegal sentence at any time. The court may correct a sentence imposed in an illegal manner or reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after entry of any order of the Supreme Court denying an application for a writ of certiorari.

In Hill v. United States, U.S. , 82 S.Ct. 468 (1962) the Court held that a motion to correct an illegal sentence under Rule 35 was not an appropriate way for a defendant to raise the question whether when he appeared for sentencing the court had afforded him an opportunity to make a statement in his own behalf as required by Rule 32(a). The majority of the Court said that "the narrow function of Rule 35 is to permit correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of the sentence." The dissenting justices contended "that a sentence imposed in an illegal manner -- whether the amount or form of the punishment meted out constitutes an additional violation of law or not -- would be recognized as an 'illegal sentence' under any normal reading of the English language."

Questions arising in connection with sentences imposed in an illegal manner -- e.g., where the court failed to comply with the procedures of Rule 32(a) in imposing sentence, or imposed sentence out of the presence of the defendant in violation of Rule 43 -- do not appear to be so fundamental as to make it desirable to permit the defendant to have an indefinite time in which to move for their correction. The amendment gives a 60 day period for raising such issues.

RULE 45

TIME

(a) Computation. In computing any period of time the day of the act or event ~~after~~ from which the designated period of time begins to run ~~is~~ shall not ~~to~~ be included. The last day of the period so computed ~~is to~~ shall be included unless it is a Saturday, a Sunday, or legal holiday, in which event the period runs until the end of the next day which is ~~neither~~ not a Saturday, a Sunday, ~~nor~~ or a legal holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. ~~A half holiday shall be considered as other days and not as a holiday.~~ As used in these rules, "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if ~~application~~ request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done ~~after the expiration of the specified period~~ if the failure to act was the result of excusable neglect; but the court may not ~~enlarge the period~~ extend the time for taking any action under Rules 29, 33, 34, ~~and 35, except as otherwise provided in these rules, or the period for taking an appeal~~ 35, 37(a)(2) and 39(c), except and to the extent and under the conditions stated in them.

(c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act in a criminal proceeding.

ADVISORY COMMITTEE'S NOTE

Subdivision (a): This amendment is designed to conform the subdivision with the amendments proposed for the comparable provision in Civil Rule 6(a). See Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts (October 1961). The only major change is to treat Saturdays as legal holidays for the purpose of computing time.

Subdivision (b): The amendment conforms the subdivision to the amendments made effective in 1948 to the comparable provision in Civil Rule 6(b). One of these conforming changes, substituting the words "extend the time" for the words "enlarge the period" will clarify the ambiguity which gave rise to the

decision in United States v. Robinson, 361 U.S. 220 (1960). The amendment also, in connection with the amendments to Rules 29 and 37, makes it clear that the only circumstances under which extensions can be granted under Rules 29, 33, 34, 35, 37(a)(2) and 39(c) are those stated in them.

Subdivision (c): The amendment conforms the subdivision to the amendments made effective in 1948 to the comparable provision in Civil Rule 6(c).

RULE 49

SERVICE AND FILING OF PAPERS

(a) Service: When Required. Written motions other than those which are heard ex parte, written notices, designations of record on appeal and similar papers shall be served upon ~~the adverse parties~~ each of the parties.

(c) Notice of Orders. Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party ~~affected thereby~~ a notice thereof and shall make a note in the docket of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 37(a)(2).

ADVISORY COMMITTEE'S NOTE

Subdivision (a). The words "adverse parties" in the present rule introduce a question of interpretation. When, for example , is a co-defendant an adverse party? The amendment requires service on each of the parties thus avoiding the problem of interpretation and promoting full exchange of information among the parties. Cf. the amendment which has been proposed to Civil Rule 5(a). Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, October 1961.

Subdivision (b). The words "affected thereby" are deleted for the same reasons that the change is made in Subdivision (a). Cf. the similar change proposed in Civil Rule 77(d). Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, October 1961. The sentence which is added conforms the rule to a change made in Civil Rule 77(d) effective in 1948. The question has arisen in a number of cases whether failure or delay in giving notice on the part of the clerk results in an extension of the time for appeal. The "general rule" has been said to be that in the event of such failure or delay "the time for taking an appeal runs from the date of later actual notice or receipt of the clerk's notice rather than from the date of entry of the order." Lohman v. United States, 237 F.2d 645, 646 (C.A. 6, 1956). See also Rosenbloom v. United States, 355 U.S. 80 (1957) (permitting an extension). In two cases it has been held that no extension results from the failure to give notice of entry of judgments (as opposed to orders) since such notice is not required by Rule 49(d). Wilkinson v. United States, 278 F.2d 604 (C.A.10, 1960), cert. den. 363 U.S. 829; Hyche v. United States, 278 F.2d 915 (C.A. 5, 1960), cert. den. 364 U.S. 881. In view of the amendment to Rule 37(a)(2) permitting relief from default within 30 days after expiration of the time for appeal, it seems desirable that any possibility of an extension without time limit because of the clerk's failure to mail a notice should be eliminated.

RULE 54

APPLICATION AND EXCEPTION

(a) Courts and Commissioners

(1) Courts. These rules apply to all criminal proceedings in the United States District Courts; which include the District Court for the Territory of Alaska, the District Court of Guam, and the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that all offenses shall continue to be prosecuted in the District Court of Guam and in the District Court of the Virgin Islands by information as heretofore except such as may be required by local law to be prosecuted by indictment by grand jury. The rules governing proceedings after verdict or finding of guilt or plea of guilty apply in the United States District Court for the District of the Canal Zone.

(b) Proceedings.

(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under Title 18, U.S.C. Chapter 403 -- Juvenile Delinquency -- so far as they are inconsistent with that Chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U.S.C. §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U.S.C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325-327, 16 U.S.C. §§ 772-772i, or to proceedings against a witness in a foreign country under Title 28, U.S.C. §1784.

ADVISORY COMMITTEE'S NOTE

The change in subdivision (a) reflects the granting of statehood to Alaska.

The change in subdivision (b) is made necessary by the new provision in Rule 20(d).

No change for present 10/3

RULE 55

RECORDS

The clerk of the district court and each United States commissioner shall keep such records in criminal proceedings as the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, may prescribe. Among the records required to be kept by the clerk shall be a book known as the "criminal docket" in which, among other things, shall be entered each order or judgment of the court. The entry of an order or judgment shall show the date the notation is made.

ADVISORY COMMITTEE'S NOTE

Under the amendment to Rule 37(a)(2) the crucial point from which the time to appeal commences to run is the date of the actual notation of the order or judgment in the criminal docket. The change proposed here is to require in the rules that such a docket be kept and that it show the dates on which judgments or orders are noted therein. Cf. Civil Rule 79(a).

approved as amended 10/3

RULE 56

COURTS AND CLERKS

The court of appeals and the district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a ~~district~~ court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, and Christmas Day.

ADVISORY COMMITTEE'S NOTE

The change is in conformity with the change proposed in Civil Rule 77(c). See Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, October 1961.